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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	Case No.: CR-14-0196 CRB
)	
Plaintiff,)	
)	UNITED STATES' MEMORANDUM
v.)	REGARDING PROPOSED REDACTIONS TO THE
)	ORDER DENYING MOTIONS TO SUPPRESS
KWOK CHEUNG CHOW, et al,)	
)	
Defendant.)	
)	
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)	

INTRODUCTION

On March 26, 2015, defendants Leland Yee and Keith Jackson filed motions to suppress evidence obtained as a result of five separate Title III wiretaps, or in the alternative, for *Franks* hearings. By operation of the Court's Order granting Stipulation re Joinders, the remaining defendants joined in the motions.

U.S. MEMO RE: REDACTIONS TO
ORDER DENYING MOTIONS
TO SUPPRESS
CR-14-0196 CRB

On July 9, 2015, the Court filed the Memorandum and Order Denying Motions to Suppress and did so under seal. On the same date, the Court filed an Order to Show Cause in which the Court stated that it filed the Order under seal because the Order cited extensively to the parties' memoranda, declarations, and exhibits, all of which were filed under seal. *See*, Order to Show Cause, Dkt. 869, at 1. The Court advised that it anticipated that some of its Order will be unsealed. The Court ordered the parties to submit to Magistrate Judge Spero, no later than July 23, 2015, their proposed redactions to the Order. That submission must be filed under seal. *Id.* at 1-2. The Court further ordered the parties to submit arguments in support of their proposed redactions; those filings are to be publicly filed. *Id.* at 2.

Pursuant to the Court's Order, the government has filed under seal a copy of the Memorandum and Order Denying Motions to Suppress with redactions. The government submits the following in support of its proposed redactions.

DISCUSSION

The United States agrees with the Court that significant portions of the Order Denying Motions to Suppress (hereafter "Order") are suitable for public disclosure. However, the government submits that some limited redactions to the Order are necessary in order to protect certain interests and comply with the sealing requirements of 18 U.S.C. § 2518(8)(b). The government seeks only to redact information that identifies individuals who are unindicted third parties. Consistent with applicable case law and statute, redaction of such identifying information is appropriate in order to protect the privacy interests of third parties who either committed no crimes themselves or have thus far not be charged with committing any crimes, and to protect the integrity of ongoing investigations.

In submitting the proposed redactions to the Order, the government is mindful of the position taken by the media coalition that has submitted legal arguments to the Court seeking to unseal all or portions of the exhibits accompanying the motions to suppress, including the wiretap applications and affidavits. The government's proposed redactions to the Order fully comply with what is required by the law, and moreover, meet the standard in the case upon which the media coalition bases its argument for unsealing and disclosure, *In re the Matter of the New York Times Company, New York News Inc. and The Associated Press* ("New York Times I"), 828 F.2d 110 (2d Cir. 1987). In the letter the media

1 coalition submitted recently to the Court, the coalition members argued that under *New York Times I*, the
2 exhibits filed in connection with the motions to suppress should be unsealed. This includes the wiretap
3 affidavits and applications. As part of that request, the members specifically requested unsealing of
4 information pertaining to persons identified in the grand jury indictment, “whether or not they have been
5 indicted.” Dkt. 862, at 1.

6 In *New York Times I*, the district court denied the motion of news organizations to make public
7 certain papers filed in connection with motions to suppress evidence derived from wiretaps. The papers
8 sought included the government’s application and affidavits; the Court’s order granting the wiretap; and
9 references to, and excerpts from, conversations relied upon to establish probable cause; and references
10 to, and excerpts from, conversations intercepted on the wiretaps. *New York Times I*, *supra*, 828 F.2d at
11 112-113. In reviewing the district court’s decision and subsequently remanding the matter back to the
12 trial court, the Second Circuit found a qualified right under the First Amendment to access to written
13 documents filed in connection with pretrial motions. *Id.* at 114, *citing Press-Enterprise Co. v. Superior*
14 *Court*, 478 U.S. 1 (1986). When it comes to access to applications and affidavits submitted to the court
15 for Title III wiretaps, the Second Circuit turned to the legislative history of the Title III provisions and
16 noted Congress’s emphasis on protecting privacy interests. *Id.* at 115-116. The Court found that “the
17 right to privacy protected by Title III is extremely important.” *Id.* at 115. It went on to say: “We do
18 not suggest that the existence of Title III material within the motions papers is of little or no
19 significance. Indeed, much of what we have already said suggests precisely the opposite. Certainly, the
20 privacy interests of innocent third parties as well as those of defendants that may be harmed by
21 disclosure of the Title III material should weigh heavily in a court’s balancing equation in determining
22 what portions of motion papers in question should remain sealed or should be redacted.” *Id.* The Court
23 accordingly held that the First Amendment right to access was not absolute. It stated that interests such
24 as the defendants’ rights to a fair trial, defendants’ privacy interests, and the interests of third parties
25 could overcome the right to access, and when such interests are at stake, redaction or sealing might be
26 appropriate. *Id.* at 116. The Court vacated the district court’s order sealing the documents and
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1 remanded for specific findings as to whether certain documents or portions of documents must remain
2 sealed or must be redacted. *Id.*

3 This is exactly the procedure that this Court has been following in dealing with possible
4 unsealing of the suppression motions, declarations, and exhibits, and now with the Court's Order
5 Denying Motions to Suppress. The words and passages in the Order that the government proposes
6 should be redacted are very limited and pertain to the identities of third parties who were intercepted
7 conversing with the subjects of the investigation. These third parties, who are either innocent of any
8 wrongdoing or may have engaged in some degree of criminal conduct but have not been charged with a
9 crime, have a significant privacy interest that outweighs the public's general interest in access to wiretap
10 documents. Further, the government has an interest in maintaining the confidentiality of matters for
11 which third parties may have some criminal liability, but no charges have been filed to date. These
12 concerns hold with equal force even where some individuals were mentioned – although not by name –
13 in the indictment in this case.

14 Moreover, in a more recent case, *In the Matter of the Application of the New York Times*
15 *Company to Unseal Wiretap & Search Warrant Materials (New York Times II)*, 577 F.3d 401 (2d Cir.
16 2009), the same Circuit upon which the media coalition here rely in making their argument for
17 disclosure went considerably further in recognizing the privacy protections afforded under Title III in
18 the more recent case. In contrast to the comments of the panel in *New York Times I*, the Second Circuit
19 in *New York Times II* expressly found that one subsection of the wiretap statute, 18 U.S.C. § 2518(8)(b),
20 was directly relevant to the question of media access to wiretap materials, including affidavits and
21 applications.¹ *Id.* at 405. That provision requires that such documents “shall be sealed by the judge,”
22 and “shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction....”
23 *Id.* Citing this provision, the *New York Times II* Court found that the plain language of the statute
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25 ¹ In *New York Times I*, the Court held that it did not need to reach the question
26 whether § 2518(8)(b) was applicable to the issue before it because the petitioners were seeking “Title III
27 material to the extent it is contained in the motion papers filed with the Court.” *Id.* at 116, n.1. The
28 Court did not explain how wiretap affidavits and applications filed as exhibits with a motion to suppress
do not come within the protection of § 2518(8)(b).

1 created a strong presumption against disclosure, both of the wiretap applications and of the fruits of the
2 Title III surveillance. *Id.* at 406-07. Referring to its holding in *Nat'l Broadcasting Co. v. U.S. Dep't of*
3 *Justice* ("*NBC*"), 735 F.2d 51, 54 (2d Cir. 1984), the Court stated: "In that case, we concluded that the
4 structure and purpose of Title III – including the provision governing disclosure of wiretap applications
5 – revealed a manifest congressional intent that wiretap applications be treated confidentially and clearly
6 negated a presumption in favor of disclosure." *Id.* at 408.

7 The Second Circuit then went on to hold that the New York Times' generalized request for
8 disclosure based on what the Times characterized as "a 'public interest in the materials or the common
9 law or First Amendment right of access' to them" did not demonstrate a need for the materials and thus
10 did not meet the requirement of "good cause" for disclosure under § 2518(8)(b). *Id.* 408-409. The
11 Court concluded that the New York Times did "not enjoy a First Amendment right of access to wiretap
12 applications sealed under 18 U.S.C. § 2518(b)(8)." *Id.* at 411. The Court based this conclusion on the
13 following factors: (1) historically, wiretap applications have not been open to the press and general
14 public; (2) the Times did not present a good reason why its preferred public policy of openness "is more
15 compelling than Congress's preferred policy of favoring confidentiality"; and (3) "the public and the
16 press are not permitted to attend the *ex parte, in camera* proceedings where wiretap applications are
17 presented to a district judge." *Id.* at 410. (Citations omitted.)

18 The government submits that the media coalition in the present case stands in the same shoes as
19 the media seeking the same disclosures in *New York Times II*. The media coalition members cite the
20 public's First Amendment right to access to pretrial motions but offer no articulable need for the
21 material they seek and certainly do not meet the requirement of good cause under § 2518(8)(b). This
22 applies not only to the members' request to unseal the exhibits in support of the suppression motion,
23 including the wiretap affidavits and applications, but also to their more limited request for disclosure of
24 information pertaining to persons "already identified in the grand jury indictment in this case, whether or
25 not they have been indicted." Dkt. 862, at 1.

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CONCLUSION

For the reasons stated above, the government respectfully requests that the Court adopt the limited redactions to the Order Denying Motions to Suppress proposed by the government.

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Respectfully submitted,

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